

ST 95-8

Tax Type: SALES TAX

Issue: Separately Stating Tax/Separately Contracting For

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
ADMINISTRATIVE HEARINGS DIVISION  
CHICAGO, ILLINOIS

-----  
THE DEPARTMENT OF REVENUE )  
OF THE STATE OF ILLINOIS ) Case Nos. XXXXX  
 ) XXXXX  
 v. ) IBT Nos. XXXXX  
 ) XXXXX  
XXXXXX and ) NTL XXXXX  
XXXXXX ) NTL XXXXX  
 )

---

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Special Assistant Attorney General John Alshuler on behalf of the Illinois Department of Revenue; XXXXX, P.C., by Mr. XXXXX, on behalf of XXXXX and XXXXX XXXXX

SYNOPSIS: A hearing was held in the above-captioned cause on XXXXX before Administrative Law Judge Bonny Barezky. As Ms. Barezky is no longer with the Department of Revenue, I have been assigned to issue the recommendation in this case after thoroughly reviewing the testimony and evidence of record, making findings of fact and applying all pertinent case and statutory law thereto.

The case at bar involves two assessments issued as follows: NTL No. XXXXX issued to XXXXX, and NTL No. XXXXX issued to XXXXX XXXXX XXXXX was a sole proprietorship that was succeeded by XXXXX XXXXX The taxable period at issue with respect to XXXXX is January 1, 1983 through March 31, 1987. The taxable period at issue with regard to XXXXX XXXXX is from April 1, 1987 through October 31, 1992. Both entities (hereinafter "XXXXX") constitute the taxpayer herein.

The issue at hearing is whether the receipts from transportation charges are subject to Retailers' Occupation Tax (ROT) along with

taxpayer's sales of tangible personal property in the form of heavy equipment, sand, gravel and rock, or whether the transportation charges were separately contracted for and separately stated on the invoices the taxpayer issued to its customers, and thus, not subject to ROT. The taxpayer has paid the ROT applicable to the material portion of the transactions. Testifying on behalf of the taxpayer was XXXXX XXXXX.

FINDINGS OF FACT:

1. The Department's prima facie case of tax liability as to XXXXX, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing of \$8,163.00. (Dept. Grp. Ex. No. 1).

2. The Department's prima facie case of tax liability as to XXXXX XXXXX, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction of Returns, showing a total liability due and owing of \$32,112.00. (Dept. Grp. Ex. No. 1).

3. The taxable period with respect to XXXXX XXXXX is January 1, 1983 through March 31, 1987. (Dept. Grp. Ex. No. 1; Tr. p. 5).

4. The taxable period with respect to XXXXX XXXXX XXXXX is April 1, 1987 through October 31, 1992. (Dept. Grp. Ex. No. 1; Tr. p. 5).

5. On approximately April 1, 1987, the corporation XXXXX XXXXX was incorporated and succeeded XXXXX. (Tr. p. 5, 15).

6. Both business entities hold an Illinois Commerce Commission certificate of public convenience and necessity. (Tr. pp. 15-16).

7. Said certificate authorizes the taxpayer to engage in intrastate transportation of various commodities as listed on the certificate. (Tr. p. 16, 27).

8. The taxpayer's business consists of providing a transportation service, as well as a transportation and sales of materials service. (Tr. p. 17).

9. The taxpayer transports various materials and heavy equipment owned by customers who are primarily in the construction industry. (Tr. pp. 16, 17).

10. When asked to do so by customers, the taxpayer would purchase materials from quarries on behalf of the customer and also deliver the materials to the job site. (Tr. pp. 17, 18, 20).

11. In the situations wherein the taxpayer advanced the funds, the taxpayer would bill the customer for the materials purchased, as well as for the transportation thereof. (Tr. p. 20).

12. The taxpayer paid the assessed liability on the portion of the assessment pertaining to the sale of materials. (Tr. p. 24).

14. The taxpayer filed tariffs with the Illinois Commerce Commission, which it was required by law to adhere to. (Tr. p. 22, 25-26; Taxpayer's Ex. No. 1).

CONCLUSIONS OF LAW: On examination of the record established, this taxpayer has failed to overcome the Department's prima facie case of tax liability under the assessment in question. Accordingly, by such failure, and under the reasoning given below, the determination by the Department that XXXXX XXXXX and XXXXX XXXXX XXXXX are subject to the standard rate of tax as imposed by the Illinois Retailers' Occupation Tax Act must stand as a matter of law. In support thereof, the following conclusions are made.

ISSUE: Whether the transportation charges are to be included in the selling price along with the tangible personal property sold, thereby subjecting the transportation charges to Retailers' Occupation Tax liability.

The Department prepared corrected returns (admitted into evidence as Dept. Grp. Ex. No. 1) indicating Retailers' Occupation Tax (hereinafter "ROT") liability pursuant to section 4 of the ROT Act (35 ILCS 120/4).

Section 4 of the Act provides in pertinent part as follows:

As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information, which return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.

\* \* \*

Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy ... in the name of the Department under the certificate of the Director of Revenue. ... Such certified reproduced copy ... shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax due, as shown therein.

The Department considered the taxpayer to have engaged in retail sales of the heavy equipment, rock, sand and gravel it purchased on behalf of its customers and then resold to them. The taxpayer does not contest this assertion and in fact, paid the liability assessed on the sales of these items of tangible personal property. In addition to the sale of the materials, the Department also assessed the taxpayer ROT for the hauling of said materials. The ultimate issue is stated succinctly in 86 Admin. Code ch. I, Sec.130.415(b):

The answer to the question of whether or not a seller, in computing his Retailers' Occupation Tax liability, may deduct, from his gross receipts from sales of tangible personal property at retail, amounts charged by him to his customers on account of his payment of the transportation or delivery charges in order to secure delivery of the property to such customers, or on account of his incurrence of expense in making such delivery himself, depends not upon the separate billing of such transportation or delivery charges or expense, but upon whether the transportation or delivery charges are included in the selling price of the property which is sold or whether the seller and the buyer contract separately for such transportation or delivery charges by not including such charges in such selling price.

It is the position of the taxpayer as set forth in its Prehearing Brief that the shipments at issue were governed by the common carrier tariffs as filed by XXXXX with the Illinois Commerce Commission. The taxpayer contends that as the tariffs contain the sole legal rates and

conditions under which the taxpayer may transport material, they are equivalent to law. Thus, argues the taxpayer, the tariffs and the rates constitute a separate and distinct contract for transportation and delivery. Furthermore, the tariffs constitute "documentation which demonstrates that the purchaser had the option of taking delivery of the property, at the seller's location, for the agreed purchase price, or having delivery made by the seller for the agreed purchase price, plus an ascertained or ascertainable delivery charge" as delineated in subsection d of section 130.415.

Contrary to the position of the taxpayer, it is my determination that the case of *Sprague v. Johnson*, 95 Ill.App.3d 798 (4th Dist. 1990) is applicable to the facts of the instant case. Once having determined that Sprague conducted retail sales by its sales of rock purchased from a quarry for its customers, the court held that Sprague's hauling fees were taxable under the ROT Act. The court's rationale was that Sprague failed to overcome the Department's prima facie case with documentary evidence showing that the sale of rock and the hauling of rock were separate transactions.

The instant taxpayer argues in its brief that its transportation charges in the form of tariffs were in fact separate and apart from any charges for materials and not included in the selling price of the materials. The taxpayer considers the tariffs to be documentation sufficient to overcome the Department's case and factor out the delivery charges from the selling price. It must be noted that in *Sprague* the taxpayer charged the tariffs which it filed with the Illinois Commerce Commission. However, this was not considered documentary evidence sufficient to overcome the Department's prima facie case.

Once the Department has established its prima facie case by the entry into evidence of certified copies of the corrected returns, the taxpayer

has the burden of proving by competent evidence identified with books and records that the Department's assessment is not correct. (Mel-Park Drugs v. Department of Revenue, 218 Ill.App.3d 203 (1st Dist. 1991)). Testimony alone is not sufficient to overcome the Department's prima facie case; there must be documentary evidence in the form of books and records to corroborate the oral testimony. (Rentra Liquor Dealers, Inc. v. Department of Revenue 9 Ill.App.3d 1063 (1st Dist. 1973)).

Given my conclusion that the taxpayer failed to overcome the Department's prima facie case, it is my determination that the hauling charges are an element of cost to the taxpayer/seller within the meaning of section 1 of the ROT Act, and may not be deducted by the taxpayer/seller in computing his ROT liability in accordance with section 130.415(c) of the Department's regulations.

RECOMMENDATION: Based upon the foregoing, it is my determination that NTL Nos. XXXXX and XXXXX be sustained in their entirety.

Enter:

Date: